MASSABUDI CORP SDN BHD

v.

BACTRA PROPERTIES SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: 22-480-95]
27 NOVEMBER 1996

ARBITRATION: *Agreement - Whether plaintiff's claim was a "dispute" within ambit of agreement - Clause 34 of agreement*

ARBITRATION: *Stay of proceeding - Whether could be granted when defendant had taken steps in proceedings - Whether fatal when defendant had not given any notice of intention to refer matter to arbitrator - Whether onus on defendant to show readiness and willingness to refer to arbitrator*

The plaintiff had brought an action against the defendant for an outstanding payment. The defendants filed their defence and then applied to have the proceedings stayed, pursuant to the Arbitration Act 1952, s. 6, and to refer the dispute to an arbitrator. The plaintiff opposed the application arguing that the defendant had taken steps in the proceedings and had not shown any readiness and willingness to refer the matter to arbitration. Further, the plaintiff claimed that its action was not a "dispute" within the ambit of cl. 34 of the agreement. It was for the court to determine whether a stay could be granted and the matter be referred to an arbitrator.

Held:

[1] The Arbitration Act 1952 ('the Act'), s. 6 confers upon a court the power to stay proceedings where there is submission to arbitration, but the party applying for the stay must apply for it before taking any steps in the proceedings, and the court must be satisfied that there is sufficient reason why the matter should be referred to arbitration. The party applying for the stay must at the time, when the proceedings were commenced, be willing to do all the things necessary to the proper conduct of arbitration.

[1a] On the facts of the case, the defendant had not satisfied the stated conditions under s. 6 of the Act and therefore was precluded from staying the proceedings.

[2] A party to an arbitration agreement is precluded from taking advantage of the remedy of arbitration when that party had taken positive steps such as the filing of the statement of defence. The filing of a defence itself is construed as a step in the proceedings.

[2a] The defendant had taken steps after entering appearance, to defend the case. The defence had been filed, there was a counterclaim and the defendant had applied to strike out the plaintiff's writ. On the basis of those actions, the defendant had no right to apply for stay of proceedings pursuant to s. 6 of the Act.

[3] The burden is on the defendant to show that at all material times, it was ready and willing to do all things necessary to the proper conduct of arbitration and to refer the dispute to arbitration.

[3a] The defendant had not served on the plaintiff any written notice of the intention to refer the dispute to an arbitrator pursuant to cl. 34 of the agreement. Such omission on the part of the defendant was fatal to his application for stay of proceedings.

[4] The plaintiff's claim against the defendant was for the balance outstanding, which was due from the defendant. Such a claim is to be construed as a debt due and owing *(See Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd)*. Therefore the plaintiff's claim was not a "dispute" for reference to an arbitrator under the provision of cl. 34 of the agreement.

[Defendant's application dismissed with costs.]

Cases referred to:

AR Fernandez & Others v. National Union of Bank Employees [1986] 1 CLJ 456 ***(cit)***

Ives and Barker v. Willans [1894] 2 Ch 478 ***(refd)***

Kaja Moinudeen Salim v. Sithy Zahira Fowzia Beevi (No 22-13-1993) ***(refd)***

Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(foll)***

Percy v. Young [1880] 14 Ch D 200 ***(cit)***

Pitchers Ltd v. Plaza (Queensburg) Ltd [1940] 1 All ER 151 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

Rules of the High Court 1980, O. 14, O. 18 r. 19

Other sources referred to:

Halsbury's Laws of England, 4th edn, vol 2, pp 290, 291

Mallal's Digest, Arbitration, 1994, No. 39, p 18

The Law of Arbitration, Russel, 12th edn, p 173

For the plaintiff - R Ganapathy; M/s Achan & Co
For the defendant - Ahmad Fuad (Zainal Abidin with him); M/s Ahmad Fuad Amin & Partners

Reported by Eugene Ong

JUDGMENT

Low Hop Bing J:

The defendant applied vide encl. (9), pursuant to s. 6 of Arbitration Act 1952, ('s. 6') for a stay of proceedings herein and to refer this matter to an arbitrator. The plaintiff opposes the defendant's application and relies on the following grounds:

(1) that the defendant had taken steps in the proceedings;

(2) that the defendant had not shown any readiness and willingness to refer the matter to arbitration; and

(3) that the plaintiff's claim is not a dispute to be referred to arbitration as envisaged under cl. 34 which is the arbitration cl. 34 of the agreement executed between the plaintiff and the defendant.

(1) Issues For Determination By The Court

(i) Steps In The Proceedings

It was contended for the plaintiff that the defendant, before filing encl. (9), has taken numerous steps in the proceedings and thus, having not fulfilled the prerequisites and requirements set out in s. 6, is precluded in law from invoking s. 6 for stay of proceedings.

The defendant's counsel admitted that the defendant had on 4 March 1996 filed the statement of defence solely to explain the differences between the plaintiff and the defendant. Without the statement of defence, according to the defendant's counsel, it is impossible for the defendant to state the differences.

In my judgment, s. 6 confers upon this court the power to stay proceedings where there is submission to arbitration, but the party applying for the stay must perforce fulfil the following crucial conditions *viz:*

(1) he must apply for the stay before taking any other steps in the proceedings;

(2) he must satisfy the court that:

(a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) he was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

These crucial conditions have been expressly stated in s. 6 which is reproduced below, in extenso:

> 6. Power to stay proceedings where there is submission to arbitration.
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, **before taking any other steps in the proceedings,** apply to the court to stay the proceedings, and the court, if satisfied that **there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement,** and that the applicant was at the time when the proceedings were commenced and still remains **ready and willing to do all things necessary to the proper conduct of the arbitration,** may make an order staying the proceedings. (emphasis mine).

In my view, on the facts of this case, the defendant (applicant) has not satisfied the above crucial conditions under s. 6 and is thus precluded from staying the proceedings as prayed for in this application against the plaintiff. The defendant, after entering appearance on 15 February 1995, has in effect taken the following steps in the proceedings:

(1) Filing in court and serving on the plaintiff's solicitors a copy of the defence and counter-claim, both steps having been taken on 4 March 1996. Hence by such conduct, the defendant has submitted to the jurisdiction of this court;

(2) The defendant had filed an affidavit in reply dated 31 May 1996 opposing the plaintiff's application pursuant to O. 14 of the Rules of the High Court 1980 for Summary Judgment;

(3) The defendant had filed an application to strike out the writ and statement of claim by the plaintiff (encl. (6)) on 29 May 1996 pursuant to O. 18 r. 19 of the Rules of the High Court 1980, which application was supported by the affidavit of Wan Abdul Manaf dated 27 May 1996 (encl. (5)). The plaintiff had accordingly filed the affidavit in reply of Mohd Zin dated 13 June 1996 to oppose the defendant's application which is yet to be disposed of by the Senior Assistant Registrar.

In my judgment, the defendant by taking the above positive steps after entering appearance, no longer has the right to apply to this court for stay of proceedings pursuant to s. 6. The expression "a step in the proceedings" has been defined by Lindly LJ in *Ives and Barker v. Willans* [1894] 2 Ch. 478, 484 as "something in the nature of an application to the Court and not mere talk between solicitors or solicitors' clerks, nor the writing of letters but the taking of some step such as taking out a summons or something of that kind which is in the technical sense a step in the proceedings." (See also Russell on "*The Law of Arbitration*" 12th Edn. p. 173).

In *Pembinaan Leow Tuck Chui and Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, 58, the Federal Court held, *inter alia*, that a party to an arbitration agreement is precluded from taking advantage of the remedy of arbitration when that party did not refer the dispute to arbitration and has indeed entered appearance and filed a defence to the action.

In *Pitchers Ltd v. Plaza (Queensburg) Ltd* [1940] 1 All ER 151, the English Court of Appeal held, *inter alia*, that the defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they opposed the summons for leave to sign final judgment before the master. The same court further held that a step in the action was taken when the summons to sign final judgment was answered by affidavit and no application was made to stay the action on the ground of the arbitration clause.

In the instant case, it is my specific finding that the defendant has persistently and consistently taken numerous steps in this action five to six months before filing this application for stay of proceedings.

In *Kaja Moinudeen Salim v. Sithy Zahira Fowzia Beevi* (No. 22-13-1993) (*Mallal's Digest*, 1994 under "ARBITRATION" No. 39, p. 18), I held, *inter alia*, that where the defendant had taken positive steps such as the filing of the statement of defence and the amendment thereof, the defendant's application for stay of proceedings could not be sustained and was in the circumstances dismissed with costs.

Our Courts, so also the English Courts, have made it abundantly clear that the filing of a defence itself is to be construed as a 'step' in the proceedings. (See *Halbury's Law of England*, Fourth Edn. at p. 290, at para. 563).

(ii) Readiness And Willingness To Arbitrate

The plaintiff's counsel submitted that the defendant has not, before or since the writ has been commenced, shown any readiness and willingness to arbitrate and has not stated in the affidavit in support, encl. (8), that the defendant is "ready and willing" to refer the above matter to arbitration. The counsel further

stated that this omission on the part of the defendant is fatal to the defendant's application for stay of proceedings.

The defendant's counsel contended that it is not mandatory for the defendant to give notice to the plaintiff that the defendant wishes to refer the dispute to arbitration. According to him, this does not therefore preclude the defendant from referring this matter to arbitration.

In my judgment, the burden is on the defendant to show that at all material times he was ready and willing to do all things necessary to the proper conduct of the arbitration and to refer the dispute, if any, to arbitration. The defendant has not, to date, served on the plaintiff any written notice of the intention to refer the dispute (if any) to an arbitrator pursuant to cl. 34 of the agreement. The relevant portion of cl. 34 of the agreement reads as follows:

> ... upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator ...

Upon a proper construction of cl. 34, it is clear to me that where a party to the agreement (eg, the defendant) wishes to exercise his right to refer the matter to arbitration, he has to serve a written notice on the other party (eg, the plaintiff), which is the doing of a thing necessary for the proper conduct of arbitration. Further the defendant (applicant) has not affirmed any affidavit in support to show that the defendant is ready, willing and able to fulfil the requirements of s. 6, to refer the above matter to arbitration. In my judgment, such omission on the part of the defendant is fatal to an application for stay of proceedings: See *Kaja Moinudden Salim v. Sithy Fowzia Beevi and Another*, *supra*; *A.R. Fernandez & Others v. National Union of Bank Employees* [1988] 2 MLJ 135, Supreme Court; see also *Percy v. Young* [1880] 14 Ch. D 200; and *Halsbury's Laws of England*, Fourth Edn. vol. 2, p. 291, Arbitration para. 564.

(iii) A Dispute Or Difference Within Clause 34 Of The Agreement

The plaintiff's learned counsel is of the view that the plaintiff's claim against the defendant is not a dispute to be referred to arbitration as envisaged in cl. 34 of the agreement since the plaintiff's claim is for outstanding payment based on the architect's certificates and is a debt due and owing from the defendant to the plaintiff.

The defendant's learned counsel submitted that the dispute comes within the ambit of cl. 34 and should therefore be referred to arbitration.

In my judgment, in view of the fact that the plaintiff is the main contractor, the plaintiff's claim against the employer, ie, the defendant, is for balance outstanding due from the defendant as the employer pursuant to the progress payment certificates issued by the architect for work done and it has been held by the Supreme Court in *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 that such claims are to be construed as a debt due and owing. Hence, the plaintiff's claim is not a "dispute" or "difference" for reference to an arbitrator under the provisions of cl. 34.

Conclusion

Based on the foregoing grounds, I dismiss the defendant's application with costs.